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No. 88-1140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,

Respondents.

BRIEF OF PETITIONER IN REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Petitioner Robert W. Ludwig, Jr. hereby replies to the briefs of respondents in opposition to the petition for a writ of certiorari.

Argument

While it is not the function of the Court to resolve factual issues, neither should the Court be influenced by inaccurate factual statements regarding the trial and appeal in this case.

For example, contrary to respondents' statements, petitioner did not receive a full "jury trial on the merits". Br. of Resps. Evergreen Overlook and Mullen, p. i; Br. of Resp. Luppino, p. 13. The trial court entered directed verdicts for the defendants-respondents at the close of the evidence as to three causes of action, and it was these rulings denying jury trial, *inter alia*, petitioner sought to appeal. To the extent that petitioner's claims were permitted to go to the jury, petitioner prevailed.

It is also misleading to state that the issue which petitioner raised below and thus brings to the Court is "only...whether or not the Court of Special Appeals had abused its discretion...." Br. of Resps. Evergreen Overlook and Mullen, p. 6. *See, e.g.*, Pet. App., pp. 20a-22a.

These misleading statements, together with *ad hominem* attacks on petitioner which are not true, are simply designed to suggest to the Court that the petitioner obtained a full hearing and jury consideration of all his claims, and that the "discretion" exercised by the Maryland Court of Special Appeals in dismissing the appeal was in fact an unspoken, disguised but "just" disposition on the merits. Respondent Luppino even suggests that the Maryland appeals court dismissed petitioner's appeal in the exercise of its discretion simply because the "Court of Special Appeals wanted to avoid further time and expense on this matter...." Br. of Resp. Luppino, p. 11.

In a similar vein, respondent Luppino argues that the "Golden Rule" of appellate review – that in the absence of abuse, an exercise of discretion by a trial court should not be disturbed upon appeal – was properly applied by the Maryland appeals court, and that the exercise of discretion in the application of its appellate procedural rules is in effect unreviewable and "not properly before" this Court. *Id.* pp. 10-13.

The cases relied upon for this "Golden Rule" were appeals that were decided "on the merits". *See* Br. of Resp. Luppino, pp. 11-12 (citing cases). In the case at bar, the petitioner was denied review of the "merits" of his appeal.

These misleading contentions and factual misstatements are far afield and, in fact, totally irrelevant to the single, unadorned constitutional issue which petitioner brings to the Court, an issue respondents failed to address: was the extreme sanction of summary dismissal of an appeal because of the omission of pleadings in the record extract or appendix, under the circumstances of the case, an impermissible denial of petitioner's state-created right of appeal in violation of federal due process and equal protection. In other words, may a state-created right of appellate review "on the merits" of a trial court's decision be constitutionally denied in the

absence of a jurisdictional defect, or flagrant disregard of court rules or orders giving rise to a presumption of a want of merit in the appeal.

The procedural infraction which the Maryland Court of Special Appeals found, was a failure to include pleadings in the record extract or appendix pursuant to Maryland Rule 1028. Maryland Rule 1028, the rule petitioner attempted to follow to prosecute his appeal, does not specifically require the pleadings to be included, nor do the respondents dispute that the rule leaves to the litigants a modicum of judgment about the portions of the record needed for a resolution on the merits.

Respondents have essentially conceded the following relevant facts, on which petitioner's constitutional issue in part rests:

1. That the material mandated for every appeal was included in the record extract, Br. of Resp. Luppino, p. 5 n.5;
2. That "no reported Maryland decision has ever explicitly required that pleadings be included in the extract for an appeal", Br. of Resp. Luppino, p. 6; and
3. That four of seven issues on appeal had no arguable relation to the omitted pleadings, and could have been reviewed on the merits.

Respondents also seem to agree that, in Maryland, dismissal of an appeal is warranted only in egregious cases, such as bad faith or flagrant disregard of court orders, Br. of Resps. Evergreen Overlook and Mullen, pp. 9-10; Br. of Resp. Luppino, p. 9, and that the Maryland Special Appeals Court made no finding of "egregious conduct." The omission of the pleadings from the record extract in this case was neither egregious nor defiant of any court rule or order or right of respondents where, at the cost of almost $3,000 (Pet. App., p. 7a), petitioner in good faith meticulously assembled a full and fair record extract, including portions requested by respondents, and exercising judgment as to what portion of the record the court needed to decide the issues

on appeal. The Maryland appeals court should have considered petitioner's appeal on the merits.

The Court has, from the beginning, recognized that due process requires that a citizen have a fair opportunity to be heard on the merits, whether at the trial level or on appeal where the State had granted a right of appeal. The Court has stated that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). This means that a litigant, consistent with due process and equal protection, "cannot be arbitrarily denied the right to a meaningful opportunity to be heard on appeal." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987)(Brennan, J., concurring). Unless the litigant forfeits his right of appeal as a jurisdictional matter by failure to lodge a timely appeal, or by an egregious and intentional flaunting of the rules or orders of court, the litigant, having been granted a right of appeal, is entitled to a disposition of his appeal on the merits, and appellate rules should be construed to achieve that result. *Torres v. Oakland Scavenger Co.*, 487 U.S. __, 108 S. Ct. 2405, 2408 (1988); *Houston v. Lack*, 487 U.S. __, 108 S. Ct. 2379 (1988). This "important principle...[signifies] that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 108 S. Ct. at 2408. *See also Mutual Life Insurance Co. v. Phinney*, 178 U.S. 326, 337(1900)("While we have always been careful to see that the required order of procedure has been complied with..., at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction.")

The right of a citizen to have his dispute considered on the merits was regarded as so important by the Court that it evolved the *Hammond Packing Co.* rule to reconcile a state court's dismissal of legal actions for procedural (discovery) violations with the right of a litigant to a disposition on the merits. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), recently reaffirmed in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 705-706 (1982). In effect, *Hammond Pack-*

ing Co. held that the extreme sanction of dismissal for a procedural default can be sustained if the dereliction is so serious as to give rise to a presumption of a want of merit to the litigant's position. As the Court stated in *Insurance Corp. of Ireland., supra*, "due process is violated only if the behavior of the defendant will not support the Hammond Packing presumption." 456 U.S. at 706.

The due process considerations which are the underpinning of the so-called *Hammond Packing* presumption have equal applicability to a case on appeal such as the case at bar. Applying the principle of *Hammond Packing*, it is difficult to conceive that the omission of a pleading from a record extract or appendix could ever give rise to the "presumption of want of merit", except perhaps in cases presenting egregious, flagrant conduct, which is clearly not this case.

The dismissal of petitioner's appeal under the circumstances of this case runs contrary to the principles of due process underlying the *Hammond Packing* presumption, and violates the teachings of the Court in *Insurance Corp. of Ireland* and the other recent precedents quoted above.

The basic constitutional issue, whether stated in terms of the *Hammond Packing* presumption or otherwise, is whether petitioner was denied due process and equal protection because his right of appeal and his right to consideration of his appeal on the merits was denied because of a perceived, non-egregious procedural infraction, which had never been discussed, let alone condemned, in reported Maryland case law.

Petitioner's constitutionally-guaranteed right of trial by jury and his state-created right to appeal a denial of jury trial mean little if they can be taken away by a trial court's ruling which an appeals court "in its discretion" can decline to review "on the merits" because of a perceived procedural, non-jurisdictional infraction.

Conclusion

For the reasons set forth above, and in the petition, petitioner urges that the petition for a writ of certiorari be granted and the Court summarily reverse the decision of the Maryland

Court of Special Appeals dismissing the appeal with instructions to hear the appeal upon petitioner's compliance with any order of the appellate court regarding the contents of the record extract.

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Dated: February 17, 1989
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CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this seventeenth day of February, 1989, served three copies of the foregoing brief of petitioner in reply to the briefs of respondents in opposition to petition for a writ of certiorari to the Court of Special Appeals of Maryland upon respondents Evergreen Overlook, Inc., et al., the only parties required to be served, by mailing such copies to their attorneys of record in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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